Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

February 2021

‘Stale’ harassment training and the ‘reasonable steps’ defence

Harassment is defined in s.26 of the Equality Act 2010 as being when one person engages in “unwanted conduct which has the purpose or effect of violating that person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment”.

The conduct has to relate to one of the protected characteristics covered by the Equality Act, such as age, sex, race, disability or religion.

Importantly, in order for an employee to show that they have been harassed, they do not need to show that the perpetrator intended for their actions to have such an effect, just that a reasonable person would have felt that it was harassment.

Most employers will be aware of what harassment is and the fact that employees have a right of action against the organisation, if they do experience harassment at work, for example by a colleague or manager. The harassed individual will usually bring a claim against the employer either instead of or in addition to the harasser.

Read the full feature here p2>

Welcome

The cautious optimism we expressed in our January newsletter has yet to be dashed and Boris Johnson recently unveiled his roadmap out of lockdown.

All being well we’ll see a gradual easing of restrictions over a period of four months, culminating in the removal of all legal limits on social contact by 21 June.

We report on two cases involving drivers this month – one a landmark Supreme Court decision regarding the status of Uber drivers and the other a first instance decision about an employee dismissed for refusing to wear a face mask.

You will also find some frequently asked questions on the subject of suspension and an article about harassment and the reasonable steps defence – it may be time to refresh that equality and diversity training.

As always, please follow us on LinkedIn for our latest updates.

outset.

An employer will be liable for the discriminatory acts of its employees towards each other unless it has taken all reasonable steps to prevent such conduct (section 109(4) Equality Act, often known as the "statutory defence"). This is a very important defence for employers and one which can place 100% liability on the alleged wrongdoer.

Summary of a recent case

In the case of Allay (UK) Limited v Gehlen the Employment Tribunal accepted that Mr Gehlen had been the subject of a number of racist remarks by a colleague. Allay was therefore liable unless it could establish the statutory defence.

When Allay sought to rely on its equality training as a defence to Mr Gehlen's allegations of harassment, it was found lacking. Allay stated that the alleged wrong-doer had undertaken equality training 1 year prior to the date of the allegations and further, that when it heard of the allegations it ordered the colleague undertake further equal opportunities training to avoid this happening again.

Was this response enough to satisfy the statutory defence?

No. This was because the earlier training was "clearly stale", according to the EAT. At the time of the harassment, it had been over a year since the harasser had undertaken any training and there was no refresher training planned at that time.

Also, the EAT noted that colleagues of Mr Gehlen who were aware of the offensive comments made chose to do nothing. This called into question both the effectiveness of the training itself and also whether there was any monitoring of its effectiveness.

Discrimination and harassment cases cost time, money, and reputation, not to mention the impact it can have on the victim.

Setting aside some time to reflect on the subject of the statutory defence now, and whether there is more that could be done in your organisation (and acting on it if so) could be time well spent.

Welcome to new employment lawyer Hollie Whyman

Hollie joins our employment team from city firm, Fletcher Day bringing with her significant experience and pragmatism, having spent several years working as a Practice Manager at a charity before starting her legal career.

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How you can improve

Review your equal opportunities policies

- Are they up to date and comprehensive?
- Do your harassment policies actually cover harassment? Are they all about gender or do they cover the other protected characteristics too? Allay's equal opportunities policy made no reference to harassment. There was a similar omission in its anti-bullying and harassment policy, which only mentioned harassment in its title, and made no reference to race.
- Regularly remind workers where to find policies and procedures, and have systems in place to ensure that they have read and understood them.

Revisit your equality and diversity training

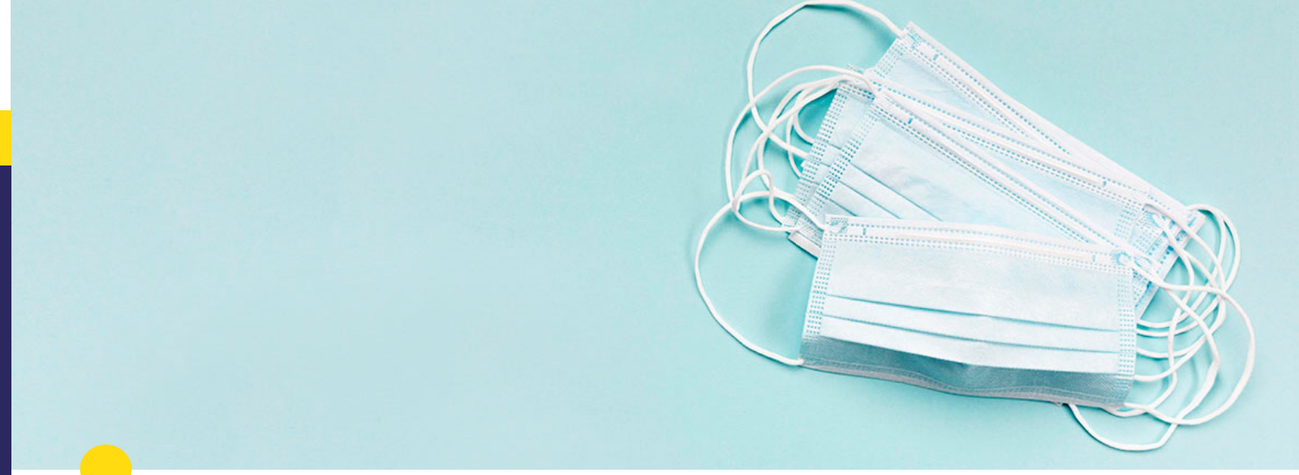
- How long ago was your last harassment training and who attended?
- Have you had significant staff turnover since then?
- Have there been any instances since then which show that the relevant messages were not taken on board by those present (either as harassers or bystanders)?
- If the training was recent, was it sufficiently comprehensive - will workers understand the key concepts of discrimination and harassment?
- Did it contain relevant examples to effectively illustrate the different protected characteristics as well as the kinds of discrimination and harassment that can occur in the workplace? If not, consider updating it.

If some time has passed since the last organisation-wide training, consider a new session or refresher.

- Consider providing tailored training to those charged with investigating complaints of discriminatory treatment so that they understand the subtleties in this area - investigating allegations of harassment is complex and needs careful handling.
- Consider putting in place a process for assessing how effective training is and how long that lasts, perhaps by testing attendees on their response to case studies after training and again at regular intervals.

Finally, consider setting aside time to reflect on the subject of the statutory defence, perhaps annually, and whether there is more that could be done (and acting on it if so).

Keeping a record of this reflection time and actions taken as a result of it should take you a very fair distance towards satisfying the statutory defence in the future.



Driver dismissed for refusing to wear a face mask in his vehicle

Deimantas Kubilius worked for his employer, Kent Foods Limited ('Kent Foods'), as a Class 1 Driver from 25 July 2016 until his dismissal without notice on 25 June 2020. On 21 May 2020 Mr Kubilius had been making a delivery at Tate and Lyle's Thames Refinery site, where he was asked to wear a mask inside the cab of his HGV as part of their new Covid rules.

Prior to 21 May 2021, Tate and Lyle had taken the decision that face masks should always be worn at this site by all staff as a safety precaution to reduce the risk of coronavirus infection. It did not update its written site rules to reflect this change because it was a temporary rule during the coronavirus pandemic. However, all visitors to the site were issued with facemasks at the gatehouse.

Mr Kubilius was surprised by the verbal instruction he was given on 21 May 2020 as there was no mention of this requirement in the written site instructions he had received on entering the site. In the words of Employment Judge Barrett, Mr Kubilius was a 'details-oriented person' and he "dug his heels in".

Having refused to wear the mask he was banned from the site on the grounds of non-compliance with health and safety rules. Tate and Lyle contacted Kent Foods about the incident. Before the disciplinary hearing Kent Foods wrote to Tate & Lyle in an attempt to persuade them to overturn the Claimant's site ban but Tate & Lyle maintained their position.

Mr Kubilius was dismissed following a disciplinary hearing.

In its defence to the unfair dismissal claim that Mr Kubilius submitted to the Employment Tribunal, Kent Foods argued that Mr Kubilius was dismissed by reason of his conduct, or in the alternative because of third-party pressure which amounted to 'some other substantial reason' and that his dismissal was fair.

Considering the rationale of the disciplinary decision maker, the Tribunal found that the principal reason for dismissal was conduct. Mr Chinamo, Site Manager at Kent Foods, attached most weight in his decision to dismiss to Mr Kubilius's refusal to comply with an instruction to wear PPE on a client site, together with his lack of remorse afterwards.

The Kent Foods Drivers handbook imposed an obligation to comply with PPE instructions at a client site and by Mr Kubilius's own account, he had refused to comply with such an instruction.

Our thoughts

The case should be treated with caution and not taken as evidence that it will always be fair to dismiss following a single incident of refusing to comply with a PPE instruction.

A reasonable employer might have concluded that this instance of misconduct merited a warning rather than summary dismissal. However, the question for the Tribunal was not what another employer might have done but whether the decision taken by Kent Foods on this occasion fell within the range of reasonable responses and it was held that it did.

Mr Chinamo was entitled to take into account the importance to Kent Foods' business of maintaining good relationships with its suppliers and customers. Mr Kubilius's continued insistence that he had done nothing wrong caused Mr Chinamo to reasonably lose confidence in his future conduct.

A further relevant factor was that it was not feasible for Mr Kubilius to continue in his contractual role due to the Tate and Lyle site ban which was a consequence of his conduct.

The case also serves as a helpful reminder that if posting a letter terminating an employee's employment, the date of dismissal will be the date the letter is received and read. In this case, the letter terminating Mr Kubilius's employment on 16 June 2020 was originally sent to the wrong address and he did not receive it. Mr Kubilius telephoned Kent Foods on 25 June 2020 to enquire what the outcome of the disciplinary hearing was. The dismissal letter was then emailed to Mr Kubilius who received and read it on 25 June 2020.

The date of dismissal was therefore 25 June 2020 and Mr Kubilius was entitled to be paid up to this actual date of dismissal and not only up to 16 June 2020.

What do I do about...
suspending my employee?

Suspension is a subject we are often asked about but employers are often not sure where to start. We answer some of the frequently asked questions:

I need to start a disciplinary process so how should I suspend the employee?

The first question is not how to do it, but whether it is, in fact, necessary. Most disciplinary procedures will not require suspension. ACAS guidance states that suspension should never be an automatic approach for an employer when dealing with a potential disciplinary matter.

Knee-jerk suspensions should be avoided and you should ensure you can demonstrate that you applied your mind to the issue of suspension and had reasonable and proper cause for deciding to suspend in the circumstances (and that these reasons stand up to scrutiny).

Suspension can amount to a breach of the implied term of trust and confidence where there is not reasonable and proper cause to suspend. That question of whether or not there is reasonable and proper cause to suspend is highly fact-specific.

How will I know if it is necessary or not?

Suspension should usually only be considered if there is a serious allegation of misconduct and:

- working relationships have severely broken down
- the employee could tamper with evidence, influence witnesses and/or sway the investigation into the allegation
- there is a risk to other employees, property or customers
- the employee is the subject of criminal proceedings which may affect whether they can do their job.

An employer considering suspending an employee should think carefully and consider all other options.

What other options might there be?

Alternatives to suspension could include the employee temporarily:

- being moved to a different area of the workplace
- working from home
- changing their working hours
- being placed on restricted duties
- working under supervision
- being transferred to a different role within the organisation (the role should be of a similar status to their normal role, and with the same terms and conditions of employment).
- Only if all other options are not practical, may suspension become necessary.

Two of my employees have had a fight, can I suspend one and not the other?

You should seek to ensure that you operate your suspension policy consistently. This is particularly the case where, for example, two employees are involved in an incident of misconduct and one is suspended and the other is not, without good reason for the difference in treatment. This might be a breach of trust and confidence.

Moreover, if the individual who is suspended has a protected characteristic that the other one does not, or has previously performed a "protected act", this might amount to a prima facie case of discrimination or victimisation.

What is the correct process for suspending?

An employee should be informed of the fact that they have been suspended as soon as possible. Any conversation to this effect should be followed up in writing promptly. The letter should, among other things:

- Make it clear that the employee is suspended and what the reason for the suspension is. Set out how long it is anticipated the employee will be suspended for.
- Point out that the purpose of the suspension is to investigate and is not an assumption of guilt.
- Explain the employee's rights and obligations during the period of suspension.
- State that the employment contract continues but that the employee is not to report to work and must not contact colleagues, clients, customers or suppliers.
- Notify the employee of a point of contact, such as an HR manager, during their period of suspension.

Suspension should not be seen as a form of punishment for the employee; instead it should be regarded as a means of carrying out an investigation as quickly and effectively as possible.

Inevitably, however, an employee will often view suspension as a punishment and, unless handled sensitively, suspension may lead an employee to conclude that the outcome of any disciplinary hearing has already been determined. Consequently, the way in which you communicate the suspension, along with the related paper trail you keep, will be important.

How long can I keep the employee suspended for?

There is no time limit as such but any period of suspension should be as short as possible. The decision to suspend should be kept under review.

An employee should be kept regularly updated about their suspension, the ongoing reasons for it, and how much longer it is likely to last. It is important that the employee is supported during this time and is able to contact someone at the workplace to discuss any concerns they may have.

What should I pay the employee during suspension?

Unless there is a clear contractual right to do so, you will not be entitled to suspend without pay. Consequently, while an employee is suspended, they should continue to receive their normal pay and benefits.

An employer should seek legal advice if they are considering suspension without pay. Unpaid suspension is more likely to be viewed as a punishment and could lead to accusations that the disciplinary procedure was not fair.

We suspended an employee pending a disciplinary investigation but there is no case to answer. She has complained that the suspension was not handled fairly, what do we do now?

Once a suspension comes to an end, the employee should be allowed to return to work immediately.

An employee may sometimes feel aggrieved about the suspension and/or worried about returning to work. Therefore, an employer should arrange a return-to-work meeting on the employee's first day back, or as early as possible. It can provide an opportunity to discuss and seek to resolve any concerns informally.

If the matter cannot be resolved informally, an employee should be directed towards the organisation's grievance procedure to make a formal complaint.

Recent Case Decisions

We summarise the case we've all been watching for a number of years and the impact it might have on Uber's business model and the gig economy.

Uber loses in the Supreme Court

On 19 February 2021 the Supreme Court unanimously dismissed Uber's final appeal, finding that Uber drivers are considered to be workers.

The case centred around the vexed question of employment status. Whether Uber drivers are to be regarded as performing services for Uber or whether, as Uber contended, they perform services solely for and under contracts made with passengers through the agency of Uber. Uber submitted that they merely provided technological and payment collection services which facilitated the drivers' contract with passengers.

However, the Supreme Court agreed with the previous findings of the Employment Tribunal, Appeal Tribunal, and Court of Appeal that the drivers are workers working for Uber during any period when the driver (a) had the Uber app switched on, (b) was within the territory in which he was authorised to work, and (c) was able and willing to accept assignments.

In reaching their decision on status, the Supreme Court emphasised five factors, previously highlighted by the Employment Tribunal, which they found were particularly indicative of a worker relationship:

1. Uber dictated how much drivers were paid and whether to refund passengers.
2. Drivers had no ability to negotiate the terms on which they contract with Uber.
3. Once the driver is logged into the Uber app they were constrained in rejecting trips as the rate of acceptance and cancellation was monitored.
4. Uber monitors a driver's service through a rating system, and had the capacity to terminate a driver if the service did not improve after repeated warnings.
5. The relationship between the driver and the passenger is restricted to a minimum, preventing the driver from establishing a relationship with a passenger. Indeed the drivers had little or no ability to improve their economic position through professional or entrepreneurial skill.

Implications for Uber

The judgement has huge consequences for Uber. Now classed as workers, its drivers will be entitled to basic employment rights such as holiday pay, pension contributions, rest breaks, the national minimum wage (and the National living wage) and the protection of whistleblowing legislation.

As workers rather than employees however, the drivers have not won the full protection of employment rights, including the right not to be unfairly dismissed and the right to a redundancy payment.

How significant is this decision outside of Uber?

The ruling may open the floodgates to claims throughout gig-economy industries from self-employed consultants who may now argue that they have been miscategorised. However the test of worker (or indeed employee) status depends on weighing up a number of factors, some which may point in favour of that outcome and others which may go against it.

The very specific way that Uber engages its drivers was closely analysed in order for the decision to be made, and the high degree of control that it exercises over its drivers from recruitment onwards was significant. Other operators' models may sit at a different point on the spectrum and, if challenged, an alternative outcome may be reached.

The most significant impact of the ruling is clearly on the gig economy. However, the ruling also affects any business seeking to show that individuals they engage are not 'workers' or, potentially, 'employees'.

The decision re-emphasises the importance of correctly assessing the status of self-employed contractors. An employment tribunal will examine the reality of the relationship between the parties, rather than simply relying on the contractual terms.

A reminder of key changes coming in April

A reminder of the changes coming in April that you might still need to prepare for.

Furlough scheme changes

The Coronavirus Job Retention Scheme is due to come to an end on 30 April, however the general consensus is that it's likely to be extended beyond this date.
We don't know if it will continue as it is or if it will begin to taper off in the months to come as it did last year. We'll know more after the Spring Budget next week.

IR35 changes

The changes were delayed by a year, but with effect from 6 April 2021.

They apply to organisations which use contractors, engaged via personal service companies (e.g. an IT consultant who invoices the client via his own Limited company).

All medium or large-sized private sector (in addition to current public sector) organisations will be responsible for deciding the employment status of such workers. If the IR35 rules apply, the worker's fees will be subject to tax and National Insurance contributions which the client must ensure are deducted.

National Minimum and Living Wage changes

From April 2021 not only will increases to the rates be applied, but the National Living Wage age bracket will be lowered to start at 23, meaning the National Minimum Wage age category 23-24 will be removed.

The increases are:

- National Living Wage (23+) from £8.72 to £8.91
- National Minimum Wage (21-22) from £8.20 to £8.36
- National Minimum Wage (18-20) from £6.45 to £6.56
- National Minimum Wage (under 18) from £4.55 to £4.62
- Apprenticeship Wage from £4.15 to £4.30

Believe it or not?

If you're thinking 'new year, new you', or maybe just 'new job' you might want to take a look at the top jobs in the UK for 2021 according to Glassdoor.

Based on salary, job openings, and job satisfaction, it turns out that a Product Manager is the best thing you can be right now. The role has a median base salary of £60,221, nearly 2,000 listings, and a respectable job satisfaction rating of 4.1 out of 5.

While this is the best overall job due to those three combined factors, Product Manager doesn't come out on top when the factors are looked at separately.

The best salary goes to the title of Enterprise Architect, with an average base of £71,932.

The role with the highest satisfaction level goes to the Full Stack Engineer with a score of 4.4.

The job with the **highest number of job openings** at the moment is a **Business Development Manager** – at last, a job title we don't need to google to understand.

In last month's newsletter we saw Harrogate topping the list of the UK's top 5 places to work from home so maybe consider a move to North Yorkshire together with that role change to maximise your chances of career satisfaction!